

**CITY OF NEWPORT BEACH
HEARING OFFICER STAFF REPORT**

February 11, 2010

Agenda Item 1

TO: Thomas W. Allen, Hearing Officer

SUBJECT: Pacific Shores Properties, LLC (PA2008-181)
492 Orange Avenue, and 492 ½ Orange Avenue
Reasonable Accommodation No. 2008-001

APPLICANT: Pacific Shores Properties, LLC

PLANNER: Janet Johnson Brown, Associate Planner
(949) 644-3236, jbrown@newportbeachca.gov

PROJECT SUMMARY

An application for Reasonable Accommodation Permit No. 2008-001 to allow the continued operation of an adult sober living facility in two dwelling units, subject to conditions that include a finding that accommodation is necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling (finding No. 2 of NBMC Section 20.98.025(B)).

The City Council of the City of Newport Beach adopted Resolution No. 2009-81 on November 10, 2009, conditionally granting a modified reasonable accommodation request and remanding the matter of financial viability to the Hearing Officer to determine whether the required findings necessary to grant the requested accommodation could be made. This is a continued public hearing from December 16, 2009, during which the Hearing Officer considered whether the requested accommodation is necessary for the facility to be financially viable.

RECOMMENDATION

Staff recommends the Hearing Officer reopen the public hearing, receive testimony from the applicant, the City of Newport Beach and its legal counsel, and members of the public. At the conclusion of the public hearing, staff recommends:

1. The Hearing Officer review the additional financial information submitted by the applicant under seal, and the written briefs submitted by both parties; and
2. Determine whether the applicant has met its burden to demonstrate the requested accommodation to allow up to 12 residents and a resident manager at each dwelling is necessary for the facility to be financially viable; and

3. If the Hearing Officer determines that the accommodation is necessary for the facility to be financially viable, staff recommends the Hearing Officer direct staff to report to the City Council that the finding can be made; or
4. If the Hearing Officer is unable to make the determination that the accommodation is necessary for the facility to be financially viable, staff recommends the Hearing Officer direct staff to submit a report to the City Council that the finding of necessity cannot be made.

BACKGROUND

Pacific Shores Properties, LLC ("Pacific Shores") operates a sober living home in three adjacent dwellings located at 492 Orange Avenue, 492 ½ Orange Avenue, and 3309 Clay Street. Following a public hearing on March 25, 2009, to consider Pacific Shores' application requesting five separate accommodations, the Hearing officer adopted five resolutions related to Pacific Shores' requests; four Resolutions of Denial of Reasonable Accommodation, and one Resolution of Approval of Reasonable Accommodation.

On October 27, 2009, the City Council conducted a public hearing on an appeal of the Hearing Officer's decisions as submitted by the applicant/appellant, and considered an amended request for Reasonable Accommodation. The City Council made a motion to grant the appeal, and to modify the Hearing Officer's decision to deny without prejudice Request No. 5 of Reasonable Accommodation No. 2009-001, subject to certain conditions.

On November 10, 2009, the City Council adopted Resolution No. 2009-81, conditionally granting a modified reasonable accommodation request to allow the operations of a sober living facility in the Orange Avenue dwellings with up to 12 residents in each dwelling. The granting of the accommodation was subject to conditions that include a finding that the accommodation is necessary to afford disabled individuals an equal opportunity to use and enjoy a dwelling (finding No. 2 of NBMC Section 20.98.025(B)).

The City Council directed the Hearing Officer to consider the specific issue of whether the requested accommodation is necessary for the facility to be financially viable, and whether or not the number of residents requested by the applicant is necessary to achieve financial viability.

On December 16, 2009, the Hearing Officer conducted a public hearing and received testimony presented by the applicant, City staff and members of the public. Following testimony from the public, the Hearing Officer closed the public hearing in order to focus on the specific content of the financial information submitted by the applicant to demonstrate the financial viability of the facilities. The Hearing Officer informed the public the financial information had been submitted under seal in order to preserve the confidentiality of the information at the request of the applicant.

The Hearing Officer reconvened the hearing *in camera* (i.e. closed session), without the presence of the public. Following discussion and argument presented by the applicant and City staff, the Hearing Officer concluded the information submitted was inadequate to render a decision on financial viability. The Hearing Officer provided direction to the applicant as to what financial information would be necessary to allow him and the City to make a decision on financial viability and allow him to render a decision to the City Council.

The Hearing Officer reopened the public hearing and informed the public the general outcome of the *in camera* proceedings, included procedures and specific financial information required to be submitted, which was agreed upon by the applicant. The Hearing Officer directed the applicant to submit specific financial information to the City by January 29, 2010, and continued the public hearing to February 11, 2010.

DISCUSSION

On December 22, 2009, the Hearing Officer issued an Order (Attachment 1) providing specific direction to the applicant and City staff regarding the required financial information and deadlines. In the Order, the Hearing Officer established that the applicant bears the burden to demonstrate the financial necessity for the number of occupants it requests for reasonable accommodation.

The Hearing Officer directed that the applicant and City staff submit briefs which discuss the amount of profit which an applicant for reasonable accommodation is entitled to earn by January 20, 2010. This deadline was extended to January 25, 2010, and complied with by both parties, who submitted the information under seal to the Hearing Officer.

The Hearing Officer also directed that the applicant submit the financial information described in the Order to the City on or before January 29, 2010. The applicant complied with the Hearing Officer's Order, submitting financial data under seal to the City by noon on January 29, 2010. This data has been analyzed by the City and the analysis was submitted under seal on February 5, 2010, to the Hearing Officer and the applicant's legal counsel.

On February 3, 2010, the Hearing Officer issued a formal request of the applicant and City staff (Attachment 2), requesting a written brief addressing the question of whether depreciation of real property should be considered as an expense in determination financial necessity in a reasonable accommodation request. The Hearing Officer also requested that one or both property owners be present at the hearing to testify as to the expenses of the LLC and properties owned by them.

CONCLUSION

Staff recommends that the Hearing Officer review the additional financial information submitted by the applicant under seal, and the written briefs submitted by both parties.

After considering all of the information submitted, and additional testimony presented by the applicant, City staff and the public, staff recommends the Hearing Officer:

1. Determine whether the applicant has met its burden to demonstrate the requested accommodation to allow up to 12 residents and a resident manager at each dwelling is necessary for the facility to be financially viable; and
2. If the Hearing Officer determines that the accommodation is necessary for the facility to be financially viable, staff recommends the Hearing Officer direct staff to report to the City Council that the finding can be made; or
3. If the Hearing Officer is unable to make the determination that the accommodation is necessary for the facility to be financially viable, staff recommends the Hearing Officer direct staff to submit a report to the City Council that the finding of necessity cannot be made.

Environmental Review

This activity has been determined to be categorically exempt under the requirements of the California Environmental Quality Act ("CEQA") under Class 1 (Existing Facilities). This class of projects has been determined not to have a significant effect on the environment and is exempt from the provisions of CEQA. This activity is also covered by the general rule that CEQA applies only to projects that have the potential for causing a significant effect on the environment (Section 15061(b)(3)) of the CEQA Guidelines. It can be seen with certainty that there is no possibility that this activity will have a significant effect on the environment and therefore it is not subject to CEQA.

Public Notice

Notice of this hearing was published in the Daily Pilot, mailed to property owners and occupants within 300 feet of the property and posted at the site a minimum of 10 days in advance of this hearing consistent with the NBMC. Additionally, the item appeared upon the agenda for this meeting which was posted at City Hall and on the City website.

Prepared by:


Janet Johnson Brown
Associate Planner

ATTACHMENTS

- Attachment 1: Order of Hearing Officer for Submittal of Financial Information to Establish Necessity dated December 22, 2009
- Attachment 2: Formal Request of Hearing Officer dated February 3, 2010

ATTACHMENT 1
Order of Hearing Officer
Dated December 22, 2009

1 THOMAS W. ALLEN
2 Attorney at Law
3 3419 Via Lido #210
4 Newport Beach Ca 92663

5 Hearing Officer

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7 **CITY OF NEWPORT BEACH**
8 **GROUP HOME HEARINGS**

9
10 IN THE MATTER OF:)

11 THE REQUEST OF PACIFIC SHORES)
12 PROPERTIES, LLC, FOR A)
13 REASONABLE ACCOMMODATION TO)
14 OPERATE A RESIDENTIAL CARE)
15 FACILITY)

ORDER OF HEARING OFFICER FOR
SUBMITTAL OF FINANCIAL
INFORMATION TO ESTABLISH
NECESSITY

16 REASONABLE ACCOMMODATION NO.)
17 RA 2008-001)

18 **Background:** On December 16, 2009, a duly noticed public hearing was held
19 before Thomas W. Allen, Hearing Officer appointed by the City of Newport Beach, at the
20 direction of the City Council, to consider one aspect of an application for reasonable
21 accommodation filed by Pacific Shores Properties, LLC ("Pacific Shores") for the adult
22 alcohol and/or drug abuse recovery and treatment facilities at 492 and 492 ½ Orange
23 Avenue, Newport Beach CA ("the Properties"). Specifically, the financial necessity
24 element of the reasonable accommodation analysis is at issue, and whether the number
25

1 of occupants Pacific Shores requests in its application are necessary to make the
2 Properties financially viable.¹

3 An applicant bears the burden to demonstrate the financial necessity for the
4 number of occupants it requests in its application for reasonable accommodation. *Lapid*
5 *Laurel v. Board. Of Zoning Adjustment of the Township of Scotch Plains* 284 Fed. 3d
6 442, 460-61 (3d Cir 2002). The Applicant herein contends a minimum of 12
7 patients/residents in each of the two dwelling units is necessary to make the Properties
8 financially viable.

9 Testimony was presented by the Applicant, City Staff and several members of
10 the public in attendance. Counsel for the parties also presented argument. At the
11 request of the Applicant, a portion of the hearing was conducted outside the presence of
12 the public because the Applicant contends and the City concurs that the financial
13 information is proprietary and subject to confidentiality pursuant to the Newport Beach
14 Municipal Code and California Evidence §1040. The Reporter recorded both the public
15 and closed sessions of the hearing and will seal the portion of the hearing containing
16 the confidential information.

17 **Financial Information Required:** Counsel for the City and the Applicant
18 informed the Hearing Officer that there is no clear guidance in reasonable
19 accommodation law for what kind of financial information should be required by, or in
20 what format it should be presented to, a governmental agency to allow it to make a
21 finding of financial necessity. Based upon the considerable discussion between the
22

23
24 ¹ In Resolution No. 2009-81 the City Council directs the Hearing Officer to: "determine
25 whether the requested number of residents [requested by Pacific Shores] are necessary
to achieve financial viability".

1 parties, attorneys and the Hearing Officer, the following describes the Financial
2 Information and substantiating evidence to be provided by the Applicant to meet its
3 burden of proof:

- 4 1. Period for Analysis: The time period covered by the information shall be the
5 most recent 12 month period for which information is available to Applicant
6 and need not be a calendar year. The Income and Expense information
7 presented shall be for the same 12 month period of time.
8
- 9 2. Income: The Applicant shall include all consideration paid, given or provided
10 to Pacific Shores Properties, LLC by all occupants, users or tenants of the
11 Properties for the stated period. Income information shall include the
12 periodical (day, week, month) amount the Applicant charges on a per
13 patient/occupant basis.
- 14 3. Expenses: The Applicant shall provide information for Water, Gas, Cable, and
15 Electrical service, Touchstone (description of service), Accounting,
16 Management Fees/Salaries, Tests (description of service), Transportation
17 (fuel), Sober Living Coalition, Insurance, Taxes (identify which property for
18 property taxes, and describe nature of any other taxes paid), Telephone and
19 Internet service, Advertising, Merchandise/Supplies, Property Maintenance,
20 Mortgage Payments (identify payments for each property and include
21 Principal & Interest).
- 22 4. Verification Documents Required: To verify Income, the Applicant shall
23 provide all leasing agreements or other occupancy contracts for the 12 month
24 period of analysis, with address of residency and amount paid clearly
25 identified, but with all patient identifying information redacted.

1 To verify Expenses, the Applicant shall provide sufficient documentation in
2 the form of receipts, bills or other data to allow the City to independently verify
3 the validity of the items listed. The documentation should verify amounts
4 paid, and in the case where an expense is incurred only by one address (e.g.,
5 mortgage payments, utilities), the documentation should identify the specific
6 address. For verification of Expenses, the Applicant shall not be required to
7 provide documentation for each repetitive period, such as every month's bills
8 for the 12 month period of analysis. Rather, examples of the monthly bills
9 showing the expense shall be adequate.

10 If the Applicant does not possess and cannot obtain verifying documentation
11 for Income or Expenses such as would be required for its tax returns, it shall
12 provide an explanation for the lack thereof.

- 13 5. Verification By Persons With Personal Knowledge: The Financial Information
14 shall contain a signed statement as follows: "The preparer(s) of this
15 information certifies to the City of Newport Beach that as of his/her personal
16 knowledge, except as otherwise noted on an entry by entry basis, the
17 documents and information presented are true, correct and accurate and may
18 be relied upon in making determinations regarding the financial viability of the
19 operation of the Properties at 492 and 492 ½ Orange Avenue, Newport
20 Beach".

21 Mr. Mark Manderson Jr. testified he is employed by Pacific Shores Properties,
22 LLC as the Manager of the Properties at 492 and 492 ½ Orange Avenue and
23 is responsible for paying their operating expenses. Mr. Manderson also
24 testified Mr. Robert Conner owns the Properties and he pays certain other
25 expenses for the Properties. Accordingly, included with the Financial

1 Information required by this Order, shall be an executed statement or
2 statements wherein Mr. Manderson identifies and certifies as true the items of
3 income and expense that are within his personal knowledge and Mr. Conner
4 identifies and certifies as true the items of income or expenses that are within
5 his personal knowledge.

6 **Confidentiality:** To the extent the Financial Information provided is to remain
7 confidential, it shall be treated accordingly by the parties.

8 **Profit:** The amount of profit which an applicant for reasonable accommodation is
9 entitled to earn shall be discussed in briefs provided to the Hearing Officer by January
10 20, 2010.

11 **Continuance and Deadlines:** The Hearing is continued to February 11, 2010 at
12 3 pm in the Council Chambers of the Newport Beach City Hall.

13 On or before 12 pm noon on January 29, 2010, the Applicant shall deliver to the
14 City the Financial Information described in this Order. The City shall deliver the
15 Information to the Hearing Officer on the same day, January 29, 2010.

16 **So Ordered.**

17
18 December 22, 2009

/s/ Thomas W. Allen, Hearing Officer

ATTACHMENT 2
Formal Request of Hearing Officer
Dated February 3, 2010

Brown, Janet

From: Tom/Pam Allen [ptlaw@sbcglobal.net]
Sent: Wednesday, February 03, 2010 1:24 PM
To: Chris Brancart; Steve Polin; Wolcott, Cathy; kip bobko
Cc: Brown, Janet
Subject: Pacific Shores

The Hearing Officer makes the following requests of the parties:

1. In the Pacific Shores Submission re Financial Information, at page 10, line 26-27, an item of expense described as "Depreciation of 492 and 492 1/2 Orange Avenue" is listed. The amount of the expense and the supporting information are described in what appears to be a copy of a Federal Income Tax Return page for the year 2007. The Hearing Officer requests the parties each submit a short brief (maximum of four pages) no later than 5 pm PST on Tuesday February 9, 2010. The brief shall address the question of whether the depreciation item should be considered as an Expense in determining financial necessity in a reasonable accommodation determination.

2. Robert or Alice Conner, or both, be present at the hearing to testify as to the Expenses of the LLC and the properties owned by them.

Thomas W. Allen, Hearing Officer